United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

77-7125

UNITED STATES COURT OF APPEALS
For The Second Circuit
Nos. 1278, 1279, 1280 - September Term, 1976

(Argued June 13, 1977 Decided September 9, 1977)
Docket Nos. 77-7125, -7126, -7139

DOROTHY L. COLE, LOIS H. ZISOOK, HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees, SAMUEL GREENFIELD FUND, INC., and HAROLD STILLER and MILDRED STILLER, as joint tenants,

Plaintiffs,

DOROTHY L. COLE, HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees, and HAROLD STILLER and MILDRED STILLER, as joint tenants,

Plaintiffs-Appellants,

v.

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION, RAPID-AMERICAN CORPORATION, ISIDORE A. BECKER, BERNARD GOLDBERG, PAUL A. JOHNSTON, DAVID A. CHERNOW, WALTER O. HEINZE, HOWARD FELDMAN, MILO B. HOPKINS, RUSSELL C. SMITH, ALBERT N. GREENFIELD, MESHULAM RIKLIS, GLEN ALDEN SUBSIDIARY, INC., F. J. CLIFFORD, W. F. JOHNSON, S. KITTAY, M. L. MENDELL, L. C. LANE, G. H. PERKINS, and B. DENMARK,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FILED
SEP 28 1977

(On Appeal from the United States District Court for the Southern District of New York)

PETITION FOR REHEARING

CHARLES TRYON, [illegible], New York, New York [illegible], Attorney for Plaintiffs-Appellants [illegible] and Anna May [illegible]

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Harry W. Voege and Anna May Tunmore, as Trustees, plaintiffs-appellants above-named, respectfully present this, their petition for a rehearing in the above-entitled cause, and in support thereof respectfully submit: that in their opinion this Honorable Court has overlooked or misapprehended the points of fact or law hereinbelow set forth.

I

The Court held (Opinion p. 5870) with respect to these appellants' contention that the merger was an unwarranted attempt to make irredeemable stock redeemable, that stockholders do not have irredeemable, vested rights to an equity interest and that the validity of Delaware's long-form merger statute, as amended in 1967, 8 Del. C. §251, was upheld by the Delaware courts. This Court concluded that in the absence of a "vested" right recognized by the state courts, appellants have no claim for the unconstitutional deprivation of these non-existent rights.

In so concluding, the Court misapprehended and failed to deal with the Voege appellants' alternative contentions, which were:

1. Coyne v. Park & Tilford Distillers Corp., 154 A.2d 893, 897 (De 1959); Veege v. American Sumatra Tobacco Corp., 192 F.Supp. 689, 692 (D. Del. 1961), relied upon by this Court, dealt only with Delaware short merger provisions, contained in §253 of the Delaware General Corporation Law.

In its original form, as enacted in 1937 (41 Del. L. C. 131), this statute (then 59A) permitted short-form mergers only if the subsidiary was wholly owned. By the 1957 amendment, dealt with in Coyne, the scope of 59A was broadened to include cases where the parent stock interest is 90% or more and to permit the parent, on such a merger, to issue, pay or deliver "securities, cash or other consideration" "upon surrender of each share of the merged corporation not owned by the parent corporation".

As so enacted in 1957, 51 Del. Laws Ch. 121 (set forth in full as Appendix A hereto) contained no Saving Clause.

Accordingly, the Court in Coyne ruled that the reserved power of the State to amend corporate charters set forth in 8 Del. Code §364 (in Delaware law since at least 1901, 22 Del. L. 353) "authorizes" the enactment of Delaware statutes "changing the rights of stockholders in respect of shares acquired prior to such enactment", and that such authority was exercised in amended 59A without qualification or limitation.

The question presented by the Voege appellants to this Court is:

Regardless of the authority expressly given by 51 Del. Laws C. 121 to change the rights of minority stockholders of 90%-owned subsidiary corporations with respect to shares acquired prior to its enactment, did the 1967 amendments of Delaware's long-form merger statute, 8 Del. Code §251, purport to "authorize" "changing the rights of minority stockholders" (on mergers of a less-than-90%-owned subsidiary effected after 1967)(to receive solely shares or other securities of the surviving corporation) "in respect of shares acquired prior to such enactment"?

2. The Voege plaintiffs submit that no such authority was granted by the 1967 amendments of §251 by virtue of the Saving Clause therein contained, which provides (8 Del. Code §393)[1] that:

> "All rights, privileges and immunities vested or accrued by or under any laws enacted prior to the adoption or amendment of this Chapter, all suits pending, all rights of action conferred, and all duties, restrictions, liabilities and penalties imposed or required by or under laws enacted prior to the adoption or amendment of this Chapter, shall not be impaired, diminished or affected by this Chapter."
> (Emphasis supplied.)

The rights, privileges and immunities of the Schenley common stockholders granted and accrued under laws enacted prior to the adoption or amendment of §251 in 1967, and the duties, restrictions and liabilities imposed on the majority stockholders

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[1] 56 Del. Laws, Ch. 50, §393 and Del. Laws of 1967, Ch. 186, §33.

of less-than-90%-owned subsidiaries on a parent-subsidiary merger, by and under such previously enacted laws which were not to be "impaired, diminished or affected" by such amendment were succinctly stated by the Delaware Courts in 1962 in Stauffer v. Standard Brands, Inc. (Del. Ch. 1962) 178 A.2d 311, affirmed (Del. Sup. Ct. 1962) 187 A.2d 78, as follows:

The provisions of §251 in force prior to the adoption of the 1967 amendments, as described by the Delaware courts in that case, are:

> "Section 251 of Title 8, Delaware Code, provides for the consolidation or merger of domestic corporations to be accomplished by an agreement between the directors of the corporations proposed to be merged which shall, among other things, prescribe the manner of converting the shares of each of the corporations into shares or other securities of the resulting corporation..."
> (Emphasis supplied.)

The rights, privileges and immunities of the minority stockholders, vested or accrued, and the duties, restrictions and liabilities of the majority stockholders with respect to these minority stockholders imposed or required by §251 (as then constituted) were construed by that Court, which ruled:

> "It is to be observed from the provisions of sections 251 and 252 that minority stockholders of corporations merging thereunder may not be summarily eliminated from the continuing enterprise, but are given the option of accepting securities in the surviving corporation, or, alternatively of demanding payment in cash for their holdings by an appraisal proceeding pursuant to §262. The difference in the rights of minority stockholders in merger proceedings

under these sections and those conferred by §253 are immediately apparent. Since a majority stockholder may not under a §251 or §252 merger eliminate minority stockholders as participants in the continuing enterprise, it is obvious that the majority should not be permitted to force the minority stockholder to elect his appraisal rights and thereby enforce his withdrawal."
(Emphasis supplied.)

Accordingly, the Voege appellants submit that this Court erred in ruling that the rights of the minority stockholders which could not be affected by these 1967 amendments were limited to only those rights that had been held to be "vested property rights" under Delaware state law.

If the 1967 amendments were to be so construed and limited, there would then have been no purpose to be served by the Saving Clause, since such vested property rights would be preserved by the Federal and State Constitutions, and the Saving Clause would be a meaningless and unnecessary gesture. (Coombes v. Getz, 285 U.S.434; Sehl v. City of Syracuse, 81 N.Y.S. 482, 484.)

By its terms, the Saving Clause is not limited to merely "rights" which are "vested".

As stated, it preserves, as well, "rights", "privileges" and "immunities" which are "accrued" by or under prior law, as well as "duties", "restrictions" and "liabilities" "imposed" on or "required" of majority stockholders by or under prior law.

Accordingly, the rights of minority stockholders not to be summarily eliminated from the continuing enterprise and to be given securities in the surviving corporation, on a §251 merger, are preserved, as well as the restriction on majority stockholders, i.e. that they may not, under a §251 merger, eliminate minority stockholders as participants in the continuing enterprise.

II

The Court erred in failing to pass upon the Voege appellants' alternative contentions set forth above, because, as the opinion states (p. 5871), "The validity of Delaware's long form merger was upheld by the Delaware Courts. Singer v. Magnavox, supra, 367 A.2d 1349; David J. Greene & Co. v. Schenley, supra, 281 A.2d 30."

These decisions are of no precedential value here because the existence of the Saving Clause and the effect to be given thereto were not presented to or passed upon by the Delaware courts in those cases. The matter was not in issue in those cases.

Greene v. Schenley involved an application for temporary injunction of the merger here involved. This application did not involve a final determination of the merits. (Public Service Commission of Wisconsin v. Wisconsin Telegraph Company, 289 U.S. 67, 70 (1933).) In the dicta that minority stockholders have no greater rights under §251 than under the short merger statute (§253), the Court there did not consider (nor was it advised) that the short merger statute contained no Saving Clause and that §251 did have a Saving Clause.

In commenting on Greene v. Schenley, Professor Folk, in his treatise on The Delaware General Corporation Law (Little Brown), stated, at page 335, that:

"It considered that the minority stockholders of the merged corporation have no greater rights under §251 than under the short merger statute (§253), an apparently novel proposition for which no authority is cited."
(Emphasis supplied.)

Singer-Magnavox, now on appeal to the Delaware Supreme Court, did not either pass upon or consider the effect of the §251 Saving Clause. It dealt exclusively with whether there was a "business purpose" requirement under Delaware law. The Saving Clause was not presented to it.

In Empire Square Realty Co. v. Chase Nat. Bank, 43 N.Y.S. 2d 470, 181 Misc. 752, affirmed (1943) 47 N.Y.S. 2d 105, 267 App. Div. 817, appeal denied 48 N.Y.S. 2d 325, 267 App. Div. 901, the Court stated (43 N.Y.S. 2d at 473):

"The opinion...in no manner passed upon the point... ...indeed, there is not the slightest intimation that the question was presented, considered or decided, and it is difficult to understand how it can be said to be binding as a precedent, for I understand a precedent to mean that a principle of law, actually presented to a court of authority for consideration and determination, has, after due consideration, been declared to serve and be followed as a rule for future guidance in the same or analogous cases; but matters which merely lurk in the record, not directly advanced and not expressly decided, cannot be regarded as precedents. KVOS, Inc. v. Associated Press, 299 U.S. 269, 279, 57 S.Ct. 197, 81 L.Ed. 183; Rodwell case, infra.

Plaintiff's counsel states that while it is true that the opinion...makes no mention in any way that the statute of limitations, as a defense, was a point presented for consideration, it was nonetheless involved and presented to the Court of Appeals and was considered and passed upon and must be so viewed from the fact that it was raised and discussed in the briefs of counsel;

> ...and from the fact that the judgment was affirmed it must be assumed the contention...was upheld, ...and in support of this construction he refers to the following statement in the opinion... 'We have examined the other points of the appellant's brief and find nothing which requires discussion.'
>
> It is safe to assume that in general no one associated with the legal profession, and particularly a digester of opinions, or citator of cases, or law writer, would ever cite or collate as a precedent any such expression in an opinion, no more so than a court of last resort would assume to found a precedent upon a casual or loose expression in an opinion of the Court; certainly much more is required as the basis for a precedent. Rodwell v. Rowland, 137 N.C. 617, 638, 50 S.E. 319, 326, 49 C.J. p. 1318; Moschzisker, Stare Decisis, p. 1."
>
> (Emphasis supplied.)

See: Webster v. Fall, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411, 413.

III

In the absence of a controlling decision by the Supreme Court of Delaware construing the Saving Clause in §251 and declaring the effect to be given thereto, this Court is at liberty to adopt the view which seems to be supported by the best reasons in determining such effect.

Davis v. Modern Indus. Bank, 279 N.Y. 405, 411.

The Voege appellants contend that this Court, in construing the Saving Clause, should adopt the construction of identical clauses advanced by the Michigan Supreme Court in Sutton v. Globe Knitting Mills, 276 Mich. 200, 267 N.W. 875 (1936), and by the

Washington Supreme Court in State ex rel. Swanson v. Perkam, 191 P.2d 689 (1948).

IV

The Voege appellants submit that this Court erred (Opinion p. 5867) in declaring that the proxy statement did not violate §14 because (n. 17) the proxy statement "gave an adequate disclosure of the shareholders' right of appraisal" as an alternative to the enforced surrender of their stock for cash and bonds of Glen Alden. This disclosure is an untrue statement of material fact, because, as stated in Stauffer, the option to be given to minority stockholders on a §251 merger is:

> "...of accepting securities in the surviving corporation, or, alternatively of demanding payment in cash for their holdings by an appraisal proceeding pursuant to §262."
> (Emphasis supplied.)

Accordingly, the proxy statement which represented to the Schenley minority common stockholders that their only options were to "endorse and surrender their Schenley common stock certificates in exchange for cash and redeemable Glen Alden Debentures" or to exercise "the shareholders' right of appraisal"[1] was false and misleading, and violated Rules 10b-5 and 14 of the 1934 Act.

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(1) Stauffer also ruled that, "The majority should not be permitted to force the minority stockholder to elect his appraisal rights and thereby enforce his withdrawal."

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the District Court be, upon further consideration, reversed.

Charles Trynin

CHARLES TRYNIN
Attorney for Petitioners and Plaintiffs-Appellants Harry W. Voege and Anna May Tunmore, as Trustees.

CERTIFICATE OF COUNSEL

I, Charles Trynin, attorney for Plaintiffs-Appellants, do hereby certify that the foregoing petition for a rehearing ofthis cause is presented in good faith and not for purpose of delay.

Charles Trynin

CHARLES TRYNIN

CHAPTER 121

CORPORATIONS

AN ACT TO AMEND CHAPTER 1, TITLE 8, DELAWARE CODE, RELATING TO CORPORATIONS.

Be it enacted by the General Assembly of the State of Delaware (two-thirds of all Members elected to each House thereof concurring therein):

Section 1. § 141, Chapter 1, Title 8, Delaware Code, is amended by adding thereto the following additional sub-section:

(g) Unless otherwise restricted by the certificate of incorporation or by-laws, any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting, if prior to such action a written consent thereto is signed by all members of the board or of such committee as the case may be, and such written consent is filed with the minutes of proceedings of the board or committee.

Section 2. § 219, Chapter 1, Title 8, Delaware Code, is amended by striking out said section and inserting in lieu thereof the following:

§ 219. List of stockholders entitled to vote; penalty for refusal to produce

The officer who has charge of the stock ledger of a corporation shall prepare and make, at least ten days before every election of directors, a complete list of the stockholders entitled to vote at said election, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder during ordinary business hours, for a period of at least ten days prior to the election, either at a place within the city, town or village where the election is to be held and which place shall be specified in the notice of the meeting, or, if not so specified, at the

APPENDIX A

place where said meeting is to be held, and the list shall be produced and kept at the time and place of election during the whole time thereof, and subject to the inspection of any stockholder who may be present. Upon the wilful neglect or refusal of the said directors to produce such a list at any election they shall be ineligible to any office at such election.

Section 3. § 242, Chapter 1, Title 8, Delaware Code, is amended by striking out of subsection (d) (1) the following clause:

"; and the affirmative vote of a majority in interest of each such class of stock so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of a majority of all other stock entitled to vote thereon."

and inserting in lieu thereof the following clause:

"; and the affirmative vote of a majority in interest of each such class of stock so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of a majority of all stock which would be entitled to vote on an amendment not requiring a class vote."

Section 4. § 151 (f), Chapter 1, Title 8, Delaware Code, is amended by adding the following sentence to said subsection (f):

Provided, however, that except as otherwise provided in Section 194, in lieu of the foregoing requirements, there may be set forth on the face or back of the certificate which the corporation shall issue to represent such class or series of stock, a statement that the corporation will furnish without charge to each stockholder who so requests, the designations, preferences and relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights.

Section 5. § 279, Chapter 1, Title 8, Delaware Code, is amended by striking therefrom the following clause:

"on application of any creditor or stockholder of the corporation,"

and inserting in lieu thereof the following clause:

"on application of any creditor or stockholder of the corporation, or on application of any person or legal entity who, in the Court's discretion, shows good cause therefor,".

Section 6. § 253, Chapter 1, Title 8, Delaware Code, is amended by striking out all of said section and inserting in lieu thereof the following:

§ 253. Merger of parent corporation and subsidiary

(a) Any corporation organized or existing under the laws of this State, or under the laws of any other state or jurisdiction subject to the laws of the United States, if the laws of such other state or jurisdiction shall permit such a merger, owning at least ninety per centum of the outstanding shares of each class of the stock of any other corporation organized or existing under the laws of this State, or under the laws of any other state or jurisdiction subject to the laws of the United States, if the laws of such other state or jurisdiction shall permit such a merger, may file in the office of the Secretary of State a certificate of such ownership and merger in its name and under its corporate seal, signed by its president or a vice-president, and its secretary or treasurer or assistant secretary or assistant treasurer, and setting forth a copy of the resolution of its board of directors to merge such other corporation or corporations and to assume all of its or their obligations, and the date of the adoption thereof; provided, however, that in case the parent corporation shall not own all the outstanding stock of the corporation to be merged, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash or other consideration to be issued, paid or delivered by the parent corporation upon surrender of each share of the merged corporation not owned by the parent corporation. A certified copy of the certificate shall be recorded in the office of the recorder of deeds of any county of this State in which the principal office of either the parent or a subsidiary corporation is located. If the surviving corporation is organized or exists under the laws of any state or jurisdiction, other than the laws of this State, the provisions of Section 252 (d) of this title shall also apply to a merger under this section.

(b) Upon the recording of the certificate pursuant to subsection (a) of this section, all of the estate, property, rights, privileges and franchises of such other corporation or corporations shall vest in and be held and enjoyed by such parent corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation or corporations, and be managed and controlled by such parent corporation, and except as hereinafter in this section provided. in its name, but subject to all liabilities and obligations of such other corporation or corporations and the rights of all creditors thereof. The parent corporation shall not thereby acquire power to engage in any business, or to exercise any right, privilege or franchise, of a kind which it could not lawfully engage in or exercise under the provisions of the law by or pursuant to which such parent corporation is organized. The parent corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation or corporations, and shall be liable in the same manner as if it had itself incurred such liabilities and obligations.

(c) If the parent corporation is a Delaware corporation, it may relinquish its corporate name and assume in place thereof the name of the merged corporation, by including it in a provision to that effect in the resolution of merger adopted by the directors and set forth in the certificate of ownership and merger, and upon the filing and recording of such certificate the change of name shall be completed, with the same force and effect and subject to the same conditions and consequences as if such change had been accomplished by proceedings under the appropriate section of this chapter.

(d) Any plan of consolidation or merger which requires or contemplates any changes other than those herein specifically authorized with respect to the parent corporation, shall be accomplished under the provisions of sections 251 and 252 of this title. The provisions of section 262 of this title shall not apply to any merger affected under this section, except as provided in paragraph (e) of this Section.

(e) In the event all of the stock of a Delaware corporation to be merged is not owned by the parent corporation, the parent corporation shall within 10 days after the date on which the

Certificate of Ownership and Merger has been filed and recorded, notify each stockholder of the corporation to be merged other than said parent corporation that the Certificate of Ownership and Mergor has been filed and recorded and the terms and conditions of the merger. The notice shall be sent by registered mail, return receipt requested, addressed to the stockholder at his last known address as it appears on the books of the corporation. If any such stockholder shall within 20 days after the date of mailing of the notice object in writing to said merger and demand in writing from the parent or surviving corporation, payment for his stock, such parent or surviving corporation shall, within 30 days after the expiration of the period of 20 days, pay to him the value of his stock on the date of the recording of the Certificate of Ownership and Merger, exclusive of any element of value arising from the expectation or accomplishment of said merger. If during the period of 30 days provided for herein the corporation and any such objecting stockholder fail to agree as to the value of such stock, any such stockholder or the corporation may file a petition in the Court of Chancery as provided in paragraph (c) of Section 262 of this title and thereupon the parties shall have the rights and duties and follow the procedure set forth in paragraphs (d) to (j), inclusive, of said Section 262.

Approved June 5, 1957.

STATE OF NEW YORK : COUNTY OF NEW YORK

CHARLES TRYNIN, being duly sworn, deposes and says that deponent is the attorney for plaintiffs-appellants Harry W. Voege and Anna May Tunmore, as Trustees, is over 18 years of age, resides at 2 Fifth Avenue, New York, New York 10011, and is not a party to this action.

That on the 23rd day of September, 1977, deponent made due service of ~~one copy of~~ the annexed Petition of plaintiffs-appellants Harry W. Voege and Anna May Tunmore, as Trustees, for Rehearing, by personal delivery of one (1) copy thereof to each of 5 the following:

5

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Attorneys for Plaintiffs

Charles Trynin
CHARLES TRYNIN

Sworn to before me this
23rd day of September, 1977.

Estelle M. Kalus
Notary Public

ESTELLE M. KALUS
NOTARY PUBLIC, State of New York
No. 31-2022187
Qualified in New York County
Commission Expires March 30, 1979